

Case No. S168078

IN THE  
Supreme Court of the State of California

City and County of San Francisco, County of Santa Clara,  
City of Los Angeles, and County of Los Angeles,

Petitioners,

Mark Horton, in his official capacity as State Registrar of Vital Statistics,  
Linette Scott, in her official capacity as Deputy Director of Health  
Information & Strategic Planning for the California Department  
of Public Health; and Edmund G. Brown, Jr., in his official  
capacity as Attorney General for the State of California,

Respondents,

Proposition 8 Official Proponents Dennis Hollingsworth, Gail J. Knight,  
Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson; and  
ProtectMarriage.com - Yes on 8, a Project of California Renewal,

Proposed Intervenor Real Parties in Interest.

PRELIMINARY OPPOSITION OF PROPOSED INTERVENOR  
REAL PARTIES IN INTEREST TO AMENDED PETITION FOR  
WRIT OF MANDATE

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*(Motion to Intervene filed concurrently)*

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**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Proposed Intervenor Real Parties in Interest hereby certify that they are not aware of any person or entity that must be listed in accordance with California Rule of Court 8.208(d).

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## **PRELIMINARY STATEMENT**

Proposed Intervenor Real Parties in Interest are the five Official Proponents of Proposition 8 (Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson) and the official campaign committee in favor of Proposition 8 (ProtectMarriage.com - Yes on 8, a Project of California Renewal, FPPC ID #1302592). Pursuant to Rule 8.490(g) of the California Rules of Court, Proposed Intervenor submit the following preliminary opposition to the Amended Petition. A Motion to Intervene is also filed herewith.

This preliminary opposition should not be deemed a full statement of arguments supporting Proposition 8. Rather, it contains a summary of some of the arguments Proposed Intervenor would make if the Court agrees to consider the merits of the issues raised by the Amended Petition and if the Court grants their Motion to Intervene. Proposed Intervenor reserve the right to make additional arguments in full briefing should the Court exercise original jurisdiction in this matter.

## **INTRODUCTION AND SUMMARY OF PRELIMINARY OPPOSITION**

Proposed Intervenor agree with Petitioners that the validity of Proposition 8 is of great public importance and should be resolved as soon as possible. The issues are purely legal and, given their constitutional and social significance, should ultimately be decided by this Court. The interests of justice and of the political system itself would not be served by the uncertainty and delay that litigation in the lower courts would cause. Proposed Intervenor urge this Court to consider on the merits the issues raised by the Petitioners and set a schedule for expeditious briefing and oral argument.

Although agreeing this Court should decide the issues raised by Petitioners, Proposed Intervenors disagree with Petitioners on the merits of their challenge. Proposition 8 is a proper initiative amendment and not a revision to the Constitution requiring extraordinary procedures. The people of California have reserved the sovereign power to amend their Constitution through the initiative process. That power is broad and deep and by nature populist. It has often been used to make significant changes in State government and to override judicial interpretations of the Constitution with which the people disagree—including interpretations involving basic constitutional rights. By reserving this power, the people of California have placed themselves at the center of an ongoing and highly democratic conversation about the meaning of the Constitution.

This Court has never suggested that the initiative power may not be used to restrict the reach of constitutional rights, whether long-established or newly recognized. Constitutional rights are often phrased broadly, allowing courts to interpret them in ways the people may deem unwise. The meaning and scope of particular constitutional rights is properly the subject of the people's power to amend the Constitution by initiative; the people have retained and play an active role in such matters. This use of the initiative power makes perfect sense when constitutional rights significantly affect basic social policy, such as the definition of fundamental social institutions like marriage. The people have reserved the power to use initiative amendments to establish public policy in critical areas, which may include the expansion or contraction of constitutional rights. Nothing in this Court's decisions regarding initiative amendments suggests otherwise.

Petitioners' arguments that Proposition 8 constitutes a revision to the Constitution are highly abstract and find no support in California case law or in the judiciary's long tradition of respectful deference to initiative

amendments. Other courts addressing similar revision/amendment arguments under closely analogous constitutional provisions have rejected them. This Court should do likewise here. Proposition 8 is simple, narrow, and targeted to a single issue. It restores the definition of marriage to what it was and always had been prior to May 15, 2008—nothing more. It does not diminish the right of same-sex couples under existing California law to obtain through registered domestic partnerships all the same substantive rights, privileges, and benefits as married spouses enjoy. Petitioners greatly exaggerate when they assert that Proposition 8 would result in such a fundamental abrogation of equal protection rights as to alter the very nature and structure of the California Constitution.

This Court's 4-3 decision in *In re Marriage Cases* (2008) 43 Cal.4th 757 (hereafter "*Marriage Cases*") broke new constitutional ground and, with due respect, was by no means self-evident. Three learned justices of this Court and two justices of the Court of Appeal—all devoted to equality before the law—reached the opposite conclusion. Petitioners challenge the people's decision to adopt the interpretation of those justices, arguing that it makes far-reaching changes to the nature of our basic governmental plan by severely compromising the core constitutional principle of equal protection of the laws. That argument, however, is strained and untenable. The effect of Proposition 8 is limited to reinstating the *status quo* that existed before the *Marriage Cases* decision took effect on June 16, 2008. Petitioners' arguments would most likely have been summarily rejected if Proposition 8 had been enacted before the *Marriage Cases* decision, and they should be rejected now for the same reasons. The revision/amendment analysis does not turn on the fortuity of timing.

Nor would Proposition 8 destroy the courts' quintessential power and role of protecting gay and lesbian rights through appropriately robust interpretations of the Constitution's privacy, due process, and equal



protection provisions. Proposition 8 does nothing to alter the power of the judiciary to define the nature and scope of constitutional rights in numerous other contexts affecting homosexual individuals. It simply establishes the State's substantive policy regarding the term "marriage." To conclude Proposition 8 is such a profound change that it requires a constitutional revision would itself constitute a dramatic departure from this Court's revision/amendment jurisprudence, one that would directly and substantially undermine the people's reserved initiative power. Whatever one's view of the wisdom of Proposition 8, the people of California have spoken and their will should be respected.

This Court should exercise its jurisdiction in this matter and set an expedited schedule for full briefing and argument so that a decision denying the petitions on the merits can be rendered as soon as possible.

### FACTS

1. Proposed Intervenors are the Official Proponents of Proposition 8 — Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson (hereafter "Official Proponents")— and ProtectMarriage.com - Yes on 8, a Project of California Renewal, FPPC ID #1302592, the official campaign committee in favor of Proposition 8 (collectively referred to as "Proposed Intervenors").

2. On June 20, 2008, Equality California and others filed a Petition for Extraordinary Relief, Including Writ of Mandate and Request for Stay ("pre-election Petition"), naming the Secretary of State as Respondent and these same Official Proponents as Real Parties in Interest. (*See Bennett v. Bowen*, S164520, Petition for Extraordinary Relief, Including Writ of Mandate and Request for Stay, filed on June 20, 2008.)

3. The pre-election Petition argued that the Official Proponents could not propose Proposition 8 by initiative because it would constitute an unlawful revision of the Constitution rather than a proper initiative amendment.

4. On June 30, 2008, the Official Proponents filed their Preliminary Opposition to the pre-election Petition.

5. On July 16, 2008, this Court summarily denied the pre-election Petition, which allowed Proposition 8 to remain on the ballot.

6. On November 4, 2008, a majority of the electorate voted to enact Proposition 8. Although some ballots are still being counted, there is little doubt Proposition 8 will receive a majority of the votes.

7. Proposition 8 adds the following 14 words to the State Constitution: “*Only marriage between a man and a woman is valid or recognized in California.*”

8. On November 5, 2008, Petitioners City and County of San Francisco, County of Santa Clara, and City of Los Angeles filed their Petition for Writ of Mandate with accompanying memorandum of points and authorities. On November 13, 2005, Petitioners, joined by the County of Los Angeles, filed an Amended Petition. As in the original pre-election Petition, Petitioners’ Amended Petition seeks to invalidate Proposition 8 on the ground that Proponents should have used the revision process to enact their amendment rather than the initiative process. Unlike the Petition in the related *Strauss* and *Tyler* actions (Case Nos. S168047 and S168066), also filed on November 5, 2008, Petitioners here do not seek an interim stay or injunctive relief.

## ARGUMENT

### **I. THIS COURT SHOULD EXERCISE ITS JURISDICTION IN THIS MATTER AND SET AN EXPEDITED SCHEDULE FOR FULL BRIEFING ON THE MERITS AND ORAL ARGUMENT.**

The Amended Petition invokes the original jurisdiction of this Court. Although this Court “customarily decline[s] to exercise such jurisdiction, preferring initial disposition by the lower courts,” (*Legislature v. Eu* (1991) 54 Cal.3d 492, 500) Proposed Intervenors agree that “the present case involves issues of sufficient public importance to justify departing from [this Court’s] usual course.” (*Ibid.*)

Indeed, the issues are of enormous public importance. The people of California are entitled to a prompt resolution of whether Proposition 8 properly amended their Constitution. Proposition 8 was the subject of a vigorous and expensive campaign that generated an intense debate and very strong feelings on both sides. The people have a right to know as quickly as possible the status and definition of marriage under the California Constitution. It is “uniformly agreed” that these “issues are of great public importance and should be resolved promptly.” (*Legislature v. Eu, supra*, 54 Cal.3d at 500.)

Moreover, the legality of a successful initiative amending the Constitution is sufficiently momentous that it must ultimately be resolved by this Court. Prolonged warm-up litigation in the lower courts would be of little or no value. The issues are purely legal, requiring no factual development in the Superior Court. If this Court exercises its jurisdiction in this matter, briefing by the parties and likely *amici* will be comprehensive and address all relevant issues. Lower court review is unlikely to shed additional light on the matter, and in any event cannot compensate for the adverse effects of delay.

Lastly, same-sex couples are entitled to know as soon as possible whether the Constitution has been amended to preclude marriage between persons of the same sex. While Proposed Intervenor support the validity of Proposition 8, it is in no one's interest to keep same-sex couples in legal limbo for an extended period of time while litigation is pending in the lower courts. Basic fairness dictates that this Court quickly resolve the issues raised in the Amended Petition.

For these reasons, and without conceding the validity of Petitioners' substantive arguments, Proposed Intervenor urge this Court to exercise its original jurisdiction and set an expedited schedule for full briefing on the merits and oral argument so the issues presented can be addressed "at the earliest practicable opportunity." (*People v. Frierson* (1979) 25 Cal.3d 142, 172.)

## **II. PROPOSITION 8 IS A VALID INITIATIVE AMENDMENT AND NOT A REVISION OF THE CONSTITUTION.**

If this Court exercises its original jurisdiction and sets this matter for a hearing on the merits, Proposed Intervenor will demonstrate that Proposition 8 is a proper constitutional amendment and that Petitioners' novel arguments cannot prevail. Adopting such arguments in order to declare Proposition 8 invalid would be unprecedented and would constitute a serious encroachment on the people's sovereign right to amend the Constitution and set basic public policy through the initiative process. Some of the arguments Proposed Intervenor intend to develop in full briefing are the following:

1. **The people's right to amend the Constitution through the initiative process is a retained sovereign power.** "All political power is inherent in the people." (Cal. Const., art. II, § 1.) The people have expressly reserved to themselves the authority to amend the Constitution by majority vote through the initiative process. (Cal. Const., art. II, § 8, subd.

(a.) When using the initiative process to amend the Constitution, the people exercise their sovereign power of self-government. The three branches of government must accord profound respect and great deference to that authority, which is the very basis of the government's democratic legitimacy.

2. **The initiative power is broad and liberally construed.**

This Court has repeatedly emphasized that the people's "power of initiative must be liberally construed . . . to promote the democratic process."

(*Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 219 ("*Amador Valley*").) "The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 332.)

3. **Petitioners bear a heavy burden in seeking to overturn**

**Proposition 8.** The strong presumption is that Proposition 8 is valid:

"[A]ll presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears."

(*Legislature v. Eu, supra*, 54 Cal.3d at 501.) Novel arguments and abstract theories should be viewed with great skepticism to the extent they purport to limit the initiative power.

4. **Constitutional Revisions are characterized by substantial changes in the structure of California's system of government.**

Revisions can be either quantitative or qualitative. (*Amador Valley, supra*, 22 Cal.3d at 222; *see also Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349.) A quantitative revision is "an enactment which is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof." (*Amador Valley, supra*, 22 Cal.3d at 222.)

Petitioners do not contend that the concise fourteen-word Proposition 8 amounts to a quantitative revision. “[A] qualitative revision includes one that involves a change in the basic plan of California government, i.e., a change in its fundamental *structure* or the foundational *powers* of its branches.” (*Legislature v. Eu*, *supra*, 54 Cal.3d at 509 [emphasis added].) Not only must a qualitative revision alter governmental power or structure, it must effect “*far reaching changes* in the nature of [California’s] basic governmental plan.” (*Amador Valley*, *supra*, 22 Cal.3d at 223 [emphasis added].)

5.     **Initiative amendments are properly used to establish public policy and define fundamental rights.** The people are not limited in the subject matters they may address through the initiative amendment process. The people have the power to amend the Constitution by initiative to establish California’s fundamental public policy in every area of the law. That power includes the authority to define -- and thus expand or contract -- the fundamental constitutional rights of particular classes of people. (*See, e.g., People v. Frierson*, *supra*, 25 Cal.3d 142 [fundamental rights of vulnerable class of criminal defendants can be amended by a constitutional initiative].) Petitioners concede that Californians can use their amendment power to define the substantive scope of an important right under the Constitution.

6.     **Initiative amendments are properly used to overturn judicial decisions with which the people disagree, including in areas of fundamental rights.** The people have not limited their initiative amendment power to matters that affect only the executive or legislative branches. The power to amend the Constitution by initiative includes the power to overturn judicial decisions that establish or reject fundamental constitutional rights. (*See, e.g., People v. Frierson*, *supra*, 25 Cal.3d 142.)

7. **Equal protection rights are not exempt from the initiative amendment power.** The fact that equal protection rights are counter-majoritarian by nature does not alter the revision/amendment analysis. *All* constitutional rights are inherently counter-majoritarian. Nothing in this Court's decisions suggests equal protection rights enjoy a special exemption from the people's power to define constitutional rights through the initiative process.

8. **Proposition 8 is a proper initiative amendment under this Court's precedent.** Proposition 8 is extremely limited and does nothing more than restore the marriage laws to how they existed prior to June 16, 2008 (when this Court's decision in the *Marriage Cases* became effective). It does not alter the basic plan of California government nor this Court's role in interpreting the Constitution—its subject is exclusively the definition of marriage. Proposition 8 leaves undisturbed all other constitutional rights affecting gays and lesbians. To the extent it limits the rights of same-sex couples, it does so only as a necessary incident to the people's sovereign decision to retain the traditional definition of marriage.

9. **The courts of other states have uniformly rejected revision/amendment claims brought against constitutional amendments that limit marriage to a man and a woman.** Courts in our sister states have rejected closely analogous challenges to similar initiative amendments. Much of the reasoning of those courts is applicable and persuasive here. (*Lowe v. Keisling* (Or. Ct. App. 1994) 882 P.2d 91; *Martinez v. Kulongoski* (Or. Ct. App. 2008) 185 P.3d 498; *Bess v. Ulmer* (Alaska 1999) 985 P.2d 979 [analyzing California revision/amendment law]; *Albano v. Att'y Gen.* (Mass. 2002) 769 N.E.2d 1242 [evaluating initiative efforts to overturn Massachusetts' same-sex marriage decision and reasoning that an initiative amendment is not invalid "merely because it

changes the law enforced by the courts. To adopt such an interpretation would be to render the popular initiative virtually useless.”].)

10. **Petitioners’ arguments would dramatically restrict the people’s reserved initiative power.** Petitioners advance a complex and unprecedented theory for why the people’s admittedly broad initiative power does not include the authority to define marriage. Frankly, the very notion is perplexing. Whatever superficial appeal Petitioners’ theories may have as a means of reaching a particular result, they would fundamentally limit the nature of the people’s reserved initiative power and should therefore be rejected. Nothing in this Court’s prior decisions remotely supports the conclusion that Proposition 8 is clearly and unmistakably a revision.

11. **Petitioners’ arguments amount to a substantive challenge to the wisdom and merits of Proposition 8.** The arguments in the Amended Petition are not truly revision/amendment arguments but rather a veiled challenge to the substance of Proposition 8. Proposition 8 forecloses such a challenge under the California Constitution. If Petitioners desire to overturn Proposition 8, their only recourse under state law is to amend the Constitution once again. The people’s initiative powers should not be circumscribed to reach a substantive result.



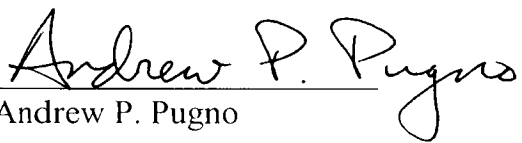
**CONCLUSION**

This Court should exercise its jurisdiction in this matter and set an expedited schedule for full briefing and argument so that a decision denying the Amended Petition on the merits can be rendered as soon as possible.

Dated: November 17, 2008

Respectfully submitted,

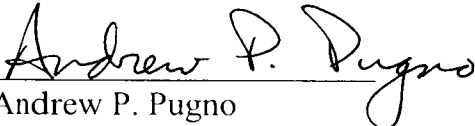
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Parties in Interest*

**RULE 8.204(C)(1) CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for Proposed Intervenors hereby certifies that this Preliminary Opposition to Petition for Extraordinary Relief is proportionately spaced, has a typeface of 13 points or more, and contains 3,047 words, including footnotes but excluding the Table of Contents, Table of Authorities, and Certificate of Compliance, as calculated by using the word count feature in Microsoft Word.

  
Andrew P. Pugno

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